National Labor Relations Board

Weekly Summary of NLRB Cases

Division of Information Washington, D.C. 20570 Tel. (202) 273-1991

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CASES SUMMARIZED
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OTHER CONTENTS

Operations-Management Memorandum (OM 04-44): Use of Agency Video Equipment by Personnel from the Federal Mediation And Conciliation Service

Press Release (R-2526): Rodney Johnson Named Regional Director of NLRB's New Orleans Regional Office

Daufuskie Club, Inc. d/b/a Daufuskie Island Club and Resort, Inc., et al. (11-CA-17334; 341 NLRB No. 81) Hilton Head, SC April 16, 2004. The Board, in this supplemental decision, denied the General Counsel's motion for partial summary judgment and remanded the proceeding to the Regional Director for hearing before an administrative law judge. [HTML] [PDF]

In its earlier decision reported at 328 NLRB 415 (1999), the Board ordered Respondent Daufuskie Club, Inc. to make whole 108 named discriminatees for their losses resulting from Daufuskie's unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the Act. On May 2, 2000, the U.S. Court of Appeals for the District of Columbia Circuit entered a judgment enforcing the Board's order. Subsequently, on about May 31, 2002, Daufuskie was sold to Tiburon Hospitality Group, et al. (Tiburon).

A controversy having arisen over the amount of backpay due the discriminatees under the Board's order, the Regional Director issued a compliance specification and notice of hearing alleging that Tiburon is a successor of Daufuskie and that they are jointly and severally liable for the amounts of backpay owed to the discriminatees. The Board held that Tiburon's denial that it was a successor to Daufuskie, and Daufuskie's denial, among other things, that the average hourly earnings formula utilized in the compliance specification was appropriate, raised issues that must be resolved at a hearing.

(Chairman Battista and Members Liebman and Walsh participated.)

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Deaconess Medical Center (19-RC-14366; 341 NLRB No. 79) Spokane, WA April 15, 2004. Members Liebman and Walsh, with Member Schaumber dissenting, adopted the hearing officer's recommendation to sustain the Petitioner's (Service Employees District 1199NW) Objection 2, which alleged that the Employer interfered with the results of the election by threatening employees with the loss of a plan to restore wage rates if they selected the Petitioner as their bargaining representative. The majority set aside the election of April 24, 2003, and directed a second election. The tally of ballots showed 252 for and 266 against, the Petitioner, and 12 challenged ballots, an insufficient number to affect the results of the election. [HTML] [PDF]

Shortly before the Union filed its petition seeking to represent the Employer's registered nurses, the Employer implemented a nine-percent across-the-board wage reduction due to the financial position of the hospital. The Employer repeatedly reassured employees that it would restore wages when it regained financial stability; it did not provide a specific date. During the election campaign, the Employer distributed materials to the employees to support its position that they should vote against the Union and a flier that generally described the process of collective bargaining.

In agreement with the hearing officer, the majority found that the Employer's prepetition promise to the employees to restore their wages was a term and condition of their employment. They noted that the promise was conditioned only on the Employer's return to "financial stability," "profitability," or a "sustained positive level" as determined by the Employer. The majority wrote: "After the Union filed its petition . . . however, the Employer told the employees

that it could easily restore the wages of nonrepresented employees if the Employer regained profitability, but that it could not do the same for employees who had become represented by the Union." That was a threat to penalize employees for exercising their right to choose union representation, they held.

Dissenting Member Schaumber stated: "[T]he legal reality was that, in the absence of an established past practice concerning wage restoration, the Employer could not change the wages of represented employees without bargaining with the Union. Therefore the statements in the campaign literature and by managers to that effect were accurate statements of the Employer's obligations under the law. My colleagues' conclusion to the contrary penalizes the Employer for explaining to employees its legal responsibilities." Because he found the Employer's statements were not objectionable conduct, Member Schaumber would certify the results of the election.

(Members Liebman, Schaumber, and Walsh participated.)

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Peirce-Phelps, Inc. (4-RC-20675; 341 NLRB No. 78) Philadelphia, PA April 12, 2004. Chairman Battista and Member Schaumber affirmed the hearing officer's recommendations, sustained the challenge to the ballot of Michael Cammoroto, and overruled the challenge to the ballot of Michael Panara, Jr. They directed the Regional Director to open and count Panara's ballot and to issue a revised tally of ballots and the appropriate certification. Member Walsh, dissenting in part, disagreed with his colleague's finding that Panara does not enjoy special privileges or benefits warranting his exclusion from the bargaining unit. [HTML] [PDF]

The tally of ballots for the election of August 15, 2003 shows 2 ballots for and 1 against, the Petitioner (Teamsters Local 169), with 2 determinative challenged ballots. The stipulated unit includes all full-time and seasonal warehousemen employed by the Employer at its Decatur Road facility, excluding all other employees.

The Employer challenged Cammoroto's ballot on the ground that he was not employed within the stipulated unit on the date of the election. Cammoroto was a full-time warehousemen on July 15, 2003, the payroll eligibility date for the election. He was transferred back to his store driver position on July 23, 2003, and continued to perform a limited amount of warehouse work on irregular and infrequent occasions. The hearing officer found that Cammoroto did not have a reasonable expectancy of returning to the unit and rejected the Employer's dual function argument on its merits. The Board, noting that Cammoroto was a store driver, not a warehousemen on the date of the election, agreed with the Employer that the hearing officer should not have addressed the dual function issue because the parties' clear intent was to exclude Cammoroto from the unit.

The Petitioner challenged Panara's ballot on the ground that he was related to a member of management. Panara, the son of the Decatur Road warehouse manager Michael Panara, Sr., worked as a warehouse employee and was supervised by his father, who had no ownership

interest in the Employer. At the time of the election, Panara was a 16-year old high school student who had worked for the Employer as a warehouse employee every summer since 2001. The majority found that Panara Jr. should not be excluded from the unit because he did not enjoy special privileges or benefits by virtue of his relationship with Panara, Sr. They noted that Panara Jr. never attended management meetings or assumed his father's authority, and that he worked under the same conditions and was subject to the same policies as other seasonal warehousemen, performing similar tasks and earning a comparable wage.

Member Walsh wrote: "Panara Junior received special treatment from the very inception of his employment. He was hired at the age of 14, and was seasonally reemployed thereafter, despite his legal incapacity to operate heaving lifting machinery—which, . . . constitutes an important part of the warehouseman's job." He also found that Panara Sr. created a fluctuating schedule specifically for his son, which ensured that Panara Jr. would be in the warehouse only when there was work available that he could perform—i.e., work not involving the operation of heavy lifting machinery. Member Walsh concluded that the scheduling accommodations, as well as the mere fact of Panara Jr's employment despite his inability to perform important job functions, are highly probative of special status. See *Novi American Inc.-Atlanta*, 234 NLRB 421, 422 (1978).

The majority noted that Panara Jr.'s exemption from the operation of heavy lifting machinery was mandated by Pennsylvania law that precludes persons younger than 18 from operating heavy machinery, and did not flow from a special benefit.

(Chairman Battista and Members Schaumber and Walsh participated.)

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

T.E. Briggs Construction Co., Inc. (Operating Engineers Local 302) Edmonds, WA April 8, 2004. 19-CA-28619, et al.; JD(SF)-26-04, Judge John J. McCarrick.

JLL Restaurant, Inc. d/b/a Smoke House Restaurant (Hotel & Restaurant Employees Local 11) Burbank, CA April 6, 2004. 31-CA-26240, et al.; JD(SF)-25-04, Judge Lana H. Parke.

Impala Bob's Inc. (Individuals) Mesa, AZ April 9, 2004. 28-CA-18858, et al.; JD(SF)-27-04, Judge Gregory Z. Meyerson.

TMC Contractors, Inc. (Cement Masons Local 502) Chicago, IL April 12, 2004. 13-CA-40398; JD-29-04, Judge Mark D. Rubin.

Pan American Grain, Inc. and Pan American Grain Mfg Co., Inc. (Congreso de Uniones Industriales de Puerto Rico) San Juan, PR April 12, 2004. 24-CA-9138, et al.; JD-31-04, Judge Paul Bogas.

American Armored Car, Ltd. (United Federation of Security Officers, Inc.) New York, NY April 13, 2004. 2-CA-33316; JD(NY)-14-04, Judge Raymond P. Green.

Masco Contractors Services East, Inc. a/k/a Cary Corp. d/b/a Cary Insulation of New Jersey (Carpenters) Philadelphia, PA April 16, 2004. 4-CA-32261, 32526; JD-32-04, Judge William G. Kocol.

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LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

(*In the following cases, the Board considered exceptions to Reports of Regional Directors or Hearing Officers)*

DECISION AND ORDER [dismissing petitions]

Poppenga Concrete, Inc., Springfield, MO, 17-RM-836, 837, April 13, 2004

DECISION AND CERTIFICATION OF REPRESENTATIVE

Lisbon Cleaning, Inc., Newark, NJ, 22-RC-12376, April 15, 2004
Health Havens Nursing and Rehabilitation Center, East Providence, RI, 1-RC-21660, April 16, 2004

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(In the following cases, the Board adopted Reports of Regional Directors or Hearing Officers in the absence of exceptions)

DECISION AND CERTIFICATE OF RESULTS OF ELECTION

Canonsburg General Hospital, Canonsburg, PA, 6-UD-179, April 13, 2004

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(In the following cases, the Board denied requests for review of Decisions and Directions of Elections (D&DE) and Decisions and Orders (D&O) of Regional Directors)

ORDER[affirming Regional Director's dismissal of petition]

Adult Learning Systems, Marquette, MI, 7-RM-1469, April 15, 2004
Quality Living Systems Management Corp., Flint, MI, 7-RM-1463, April 15, 2004
Domel, Inc., Livonia, MI, 7-RM-1461, April 15, 2004
Community Spirit Homes, Inc., Westland, MI, 7-RM-1462, April 15, 2004
Cencare Foster Home, Inc., Mt. Pleasant, MI, 7-RM-1465, April 15, 2004
Passages Community Services, Inc., Plymouth, MI, 7-RM-1470, April 15, 2004
Central State Community Services, Inc., Midland, MI, 7-RM-1464, April 15, 2004
Carson's AFC, Inc., Detroit, MI, 7-RM-1466, April 15, 2004
Flushing Association in Transitional Housing, Inc., Flushing, MI, 7-RM-1467, April 15, 2004
Lewisite, Inc., Detroit, MI, 7-RM-1468, April 15, 2004
Frederick's Family Homes, Inc., Southgate, MI, 7-RM-1471, April 15, 2004

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(In the following cases, the Board granted requests for review of Decisions and Directions of Elections (D&DE) and Decisions and Orders (D&O) of Regional Directors)

The Research Foundation of the State University of New York, Office of Sponsored Programs, Syracuse, NY; 3-RC-11410, April 15, 2004
Robert McAdco d/b/a Ukiah Ambulance, Ukiah, CA, 20-RD-2381, April 15, 2004

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Miscellaneous Board Orders

ORDER [granting Employer's appeal of Regional Director's decision to set aside the election, to transfer proceedings to the Board and to stay proceedings]

Middlesex County Economic Opportunity Corporation, North Brunswick, NJ, 22-RC-12415, April 13, 2004

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